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No. 87-317

In The

# Supreme Court of the United States

October Term, 1987

BEMIS PENTECOSTAL CHURCH, *et al.*,

*Appellants,*

vs.

STATE OF TENNESSEE, *et al.*,

*Appellees.*

**ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE**

## MOTION OF APPELLEE, STATE OF TENNESSEE, et al., TO DISMISS [OR AFFIRM]

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## QUESTIONS PRESENTED

1. Do the registration and financial disclosure requirements of Tenn. Code Ann. § 2-10-105 as applied to the appellant churches violate the free speech clause of the United States Constitution in light of *Talley v. California*?

2. Does Tennessee's Campaign Financial Disclosure Law, Tenn. Code Ann. § 2-10-101, *et seq.*, as applied to the appellant churches violate the free exercise and establishment clauses of the First Amendment of the United States Constitution?

3. Has the State in this case provided sufficient compelling reasons to justify any burden placed upon the free speech or free exercise rights of the appellant churches by the registration and financial disclosure requirements of Tenn. Code Ann. § 2-10-105?

## PARTIES TO THE PROCEEDINGS BELOW

The appellants in this action are: Bemis Pentacostal Church, Calvary Baptist Church, Inglewood Baptist Church, First Assembly of God, First Baptist Church of Bemis, First Baptist Church of Jackson, Malesus Baptist Church, North Jackson Baptist Church, Northside Assembly of God, Poplar Heights Baptist Church, Skyline Church of Christ, West Jackson Baptist Church, and Woodland Baptist Church.

The appellees in this action are: the State of Tennessee, W. J. Michael Cody, Attorney General and Reporter for the State of Tennessee, Jerry Woodall, District Attorney General of the Twenty-sixth Judicial Circuit of the State of Tennessee, and David Haines,[1] State Election Coordinator of the State of Tennessee.

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[1] Pursuant to Rule 40.3 of the Supreme Court Rules, David Haines has been substituted for David Collins as State Election Coordinator of the State of Tennessee as a result of Mr. Collins' resignation and Mr. Haines appointment effective May 1, 1987.

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## ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

## MOTION OF APPELLEE, STATE OF TENNESSEE, et al., TO DISMISS [OR AFFIRM]

Pursuant to Rule 16.1, the appellees, State of Tennessee, et al. (State) move to dismiss or affirm the appeal filed on behalf of Bemis Pentacostal Church, et al. (appellants). This motion is grounded on the fact that the questions on which the decision of this case depends are so unsubstantial as to not need further argument and do not present a substantial federal question.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved in this appeal are the First and Fourteenth Amendments to the United

States Constitution. The statute involved is the Tennessee Campaign Financial Disclosure Act of 1980 as amended. Tenn. Code Ann. § 2-10-101, *et seq.* These constitutional and statutory provisions are set out in the appellants' Jurisdictional Statement at pages 67a-88a.

## STATEMENT

A referendum was held in the city of Jackson, Tennessee on August 2, 1984 pertaining to the question of whether to legalize the sale of liquor-by-the-drink within the city limits of Jackson. Before that election, it was known to the public that the appellants contributed approximately $5,150.00 for the defeat of the referendum to a political campaign committee known as "Citizens against Drugs and Alcohol" (CADA) which had filed campaign financial disclosure statements pursuant to Tenn. Code Ann. § 2-10-101, *et seq.* disclosing the names of the appellants as contributors along with the amounts of their contributions. Some of the appellants paid for advertisements opposing the referendum in the local newspaper *The Jackson Sun*. However, prior to the trial the amounts paid for those advertisements had not been disclosed to the public by the appellants. The referendum was defeated by a vote of 6,514 against versus 6,474 in favor, a majority of forty votes.

At the trial in this case, the testimony of Reverend John Lee Taylor, pastor of the West Jackson Baptist Church, revealed the fact that his church had spent approximately $1,084.00 in opposition to the referendum

through television, radio and newspaper advertisements. Had it not been for the trial of this case, those facts would have remained unknown to the public to this day. Likewise, Reverend Billy Ringold of the Skyline Church of Christ in Jackson, Tennessee testified that his church spent approximately $800.00 in television advertisements which were not reported under the disclosure law.

The catalyst for this litigation occurred before the referendum election when David Collins, then State Coordinator of Elections for the State of Tennessee (Collins), received in the mail an anonymous letter questioning the legality of an advertisement by the West Jackson Baptist Church opposing the referendum which apparently appeared in the local newspaper, *The Jackson Sun*, prior to the election. In response to this letter, Mr. Collins sent a letter with a copy of the advertisement to Jerry Woodall, the District Attorney General for the Twenty-sixth Judicial Circuit of the State of Tennessee (Woodall). Mr. Collins stated in his letter that it appeared to him that the "church in question violated the provisions of Section 2-10-105, Tennessee Code Annotated, in failing to designate a political treasurer and thereafter file the required campaign disclosure statement." Finally, Mr. Collins indicated in the letter that since the referendum was a local question he was referring the matter to General Woodall "for whatever action he deemed appropriate".

In response to Mr. Collins' letter, Mr. Woodall requested the opinion of W. J. Michael Cody, the Attorney General and Reporter for the State of Tennessee (Cody), as to the applicability of Tennessee's Campaign Financial Disclosure Act to a group organized to defeat a local liquor

referendum. Attorney General Cody issued an opinion on August 29, 1984 stating that "such a church must file a statement with the county election commission".

As a result of that opinion, Mr. Woodall notified the appellants on August 30, 1984 that they would have to comply with the provisions of Tenn. Code Ann. § 2-10-101 *et seq.* by filing a post-campaign financial disclosure statement by September 17, 1984 as required by Tenn. Code Ann. § 2-10-105 or be subject to prosecution under Tenn. Code Ann. § 2-10-109(b). On September 10, 1984, the appellants filed suit in the Chancery Court of Madison County, Tennessee requesting that Tennessee's Campaign Financial Disclosure Law be held inapplicable to them or in the alternative unconstitutional.

On that same day, the appellants filed a motion for temporary injunction seeking to enjoin the State from prosecuting or indicting the appellants for failure to comply with Tenn. Code Ann. § 2-10-101 *et seq.* The parties entered into an agreed order which was approved by the chancery court on September 13, 1984 stating that "the failure of the plaintiffs or other churches or similarly situated religious organizations in the Twenty-sixth Judicial Circuit to file certain reporting and disclosure reports as required by the Campaign Financial Disclosure Act of 1980 . . . after the expiration of the forty-five day period provided for the filing of said act, should not be considered by the defendants or any one of them as willful violation of said act for a period not to exceed thirty days after the expiration of any appeal available to the plaintiffs in the course of the proceedings now pending before this court."

The trial of this case was held on August 7, 1985, and the chancery court issued an opinion on October 30, 1985 holding that Tennessee's Campaign Financial Disclosure Law did apply to the appellants and affirmed its constitutionality in all respects as to the appellants. An appeal of the decision of the chancery court was taken by the appellants to the Tennessee Court of Appeals on November 26, 1985. That court issued its opinion on August 21, 1986 holding that the Campaign Financial Disclosure Law did apply to the appellants, but further that Tennessee's Campaign Financial Disclosure Law as applied to referenda elections violates the free speech clause of the First Amendment of the United States Constitution.

The State filed an application for permission to appeal with the Tennessee Supreme Court which granted its application. After the submission of briefs and oral arguments, the Tennessee Supreme Court found that the free speech issue was the sole determinative issue and that it was unnecessary to address the other issues to resolve this case. Tennessee's highest court then reversed the decision of the Tennessee Court of Appeals and held that Tennessee's Campaign Financial Disclosure Law as applied to the appellants did not violate the free speech clause of the First Amendment of the United States Constitution.

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## ARGUMENT

### I.

### THE QUESTION OF WHETHER THE FREE SPEECH RIGHTS OF THE APPELLANTS ARE VIOLATED BY REGISTRATION AND DISCLOSURE REQUIREMENTS OF TENNESSEE'S CAMPAIGN FINANCIAL DISCLOSURE LAW HAS ALREADY BEEN ANSWERED BY THIS COURT IN THE NEGATIVE

The appellants in their Jurisdictional Statement argue that this Court has never directly addressed the issue of the constitutionality of prior registration and disclosure requirements in referenda elections. Jurisdictional Statement, p. 11. It is the State's contention that this Court has already implicitly upheld disclosure requirements in referenda elections against free speech attacks.[2] A review of the decisions of this Court for the past dozen years will reveal that the Tennessee Supreme Court correctly held that Tennessee's Campaign Financial Disclosure Law as applied to local referenda elections does not violate the free speech clause.

In 1976, this Court was confronted with a constitutional challenge to the Federal Election Campaign Act of 1974 in the case of *Buckley v. Valeo*, 421 U.S. 1 (1976). The congressional act is similar to Tennessee's Campaign

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[2]The State would note that in the case of *Iowans for Tax Relief v. The Campaign Finance Disclosure Commission*, 331 N.W. 2d 862 (Iowa 1983) appeal dismissed 464 U.S. 879 (1983), this Court dismissed an appeal from a decision by the Iowa Supreme Court which held that the application of a campaign financial disclosure law to an organization not created for the support or defeat of a referendum did not violate the free speech clause.

Financial Disclosure Law to the extent that both require political committees to disclose on reporting forms the source of every contribution and the receipt of every expenditure exceeding $100.00 in each instance along with the purposes of such expenditures. However, the federal law goes further than Tennessee's law in two respects. First, the amount of political contributions and expenditures for elected federal offices is limited to $1,000.00. Tennessee's law contains no such limitations on either contributions or expenditures for either candidates or referenda elections. Second, Tennessee's campaign financial disclosure law does not require the disclosure of contributions and expenditures of over $100.00 unless a total of $1,000.00 is spent or received. Tenn. Code Ann. § 2-10-107(a)(1). The congressional enactment has no such graduated disclosure mechanism.

The *Buckley* Court in applying the strict scrutiny test to the disclosure requirements of the Federal Election Campaign Act held that although compelled disclosure within the context of campaign finances infringed upon the fundamental right of free speech, such an intrusion was justified by compelling state interests. In particular, the Court enumerated three compelling reasons:

> First, disclosure provides the electorate with information as to "where political campaign money comes from and how it is spent by the candidate." In order to aid the voters in evaluating those who seek federal office, it allows voters to place each candidate in a political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. Sources of candidates' financial support would also alert the voter to the interest in which a candidate is most likely to be responsive and thus facilitate predications on future performance in office.

> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributors and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after an election ....
>
> Third, and not least significant, record keeping and reporting disclosure requirements are essential means of gathering the data necessary to protect the violations of the contribution limitations described above.

*Id.* at 66-67.

Two years after the *Buckley* decision, this Court in *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978) struck down a Massachusetts statute which prohibited any corporate contributions in referenda elections on grounds that the state had failed to provide a sufficient compelling interest to justify such an intrusion on the free speech rights of corporations. On the other hand, the *Bellotti* Court did state the following with regard to disclosure requirements for corporations in referenda elections:

> Corporate advertising unlike some methods of participation in political campaigns is likely to be highly visible. Identification of the sources of advertising may be required as a means of disclosure, so that people will be able to evaluate the arguments to which they are being subjected. *See Buckley,* 424 U.S. at 66-67, 96 S.Ct. at 57-58; *United States v. Harriss,* 347 U.S. 612, 625-26, 76 S.Ct. 808, 815-17, 98 L.Ed.2d 989 (1954). In addition, we emphasized in *Buckley* the prophylactic effect of requiring that disclosure of communication be disclosed. 424 U.S. at 67, 96 S.Ct. at 57.

*Id.,* 435 U.S. at 792, fn. 32.

In 1981, this Court was confronted with an ordinance which prohibited the contribution of more than $250.00 in support or opposition to a measure in the case of *Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290 (1981). The *CARC* Court struck down the limitation on contributions as unconstitutional because such a limit was "an impermissible restraint on freedom of association . . ." *Id.* at 300. However, the Court noted with approval another provision in the same ordinance which did require disclosure of all contributors of more than $50.00 implying that such a disclosure was the least restrictive means of supporting the state's interest in preserving the integrity of the election process. In particular the *CARC* Court stated the following:

> Whatever may be the state's interest or degree of that interest in regulating and limiting contributions to or expenditures of a candidate or a candidate's committee, there is no significant state or public interest in curtailing debate and discussion of a valid measure. By placing limits on contributions which in turn limit expenditures finally impairs freedom of expression. The integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed; if it is thought wise, legislature can outlaw an anonymous contribution.

*Id.* at 300-01.

In this case, the Tennessee Supreme Court quite correctly determined that this line of cases provides a clear implicit recognition by this Court that the disclosure requirements of Tenn. Code Ann. § 2-10-105 as applied to the appellants do not violate the free speech clause. In particular, the Tennessee court stated the following:

> From these cases, none of which involves the issue as it is presented in this case, we conclude that the United States Supreme Court has implicitly—if not explicitly—countenanced the constitutionality of simple disclosure requirements such as those imposed by the Tennessee act. In the course of invalidating the financial limitations in *Buckley, Bellotti* and *Citizens Against Rent Control* (the latter two of which involve state regulation of referenda election campaigns) the Court has repeatedly intimated that simple disclosure imposed by a narrowly construed statute does not violate the free speech clause as a general matter, at least absent some indication that the disclosure would threaten the existence of an association or result in retaliations against the members of a group. We are convinced that the act as drafted and construed does not violate the free speech clause of the First Amendment to the Constitution of the United States.

*Bemis Pentacostal Church v. State of Tennessee,* 731 S.W. 2d 897, 906-07 (Tenn. 1987).

In their Jurisdictional Statement, the appellants argue that the regulations in *Bellotti* and *CARC* "were not declared invalid because the state could have used a less restrictive means to attain the ends sought. They were declared unconstitutional because no compelling state interest was identified that was vindicated by the statute." Jurisdictional Statement, p. 13. The State would respectfully disagree with the appellants' contention which ignores the clear language of both *Bellotti* and *CARC.*

In *Bellotti,* this Court did reject Massachusetts' argument that the risk of corruption of the election process was present in referenda elections. *Bellotti,* 435 U.S. at 790. This holding is clearly distinguishable from the present case in that the nature of the interest asserted by the State

is totally different. The compelling state interest asserted in this case was primarily informing voters of how a referenda election is financed, not the risk of corruption of that process. In *Bellotti,* this Court indicated that "identification of the sources of advertising may be required as a means of disclosure, so that people will be able to evaluate the arguments to which they are being subjected." *Id.* at 1424, fn. 32

More importantly, the Court in both *Bellotti* and *CARC* was confronted with direct prohibitions and limitations on contributions and expenditures in referenda elections. As the Court in *CARC* said, there is no significant state or public interest in curtailing debate and discussion of a valid measure by limiting contributions to or expenditures in the referenda context. On the other hand, compelled disclosure of contributions and expenditures of the type required under Tennessee's Campaign Financial Disclosure Law is significantly related to informing voters of the election process and protecting the integrity of the political system.

The appellants also argue that the case of *Talley v. California,* 362 U.S. 60 (1960) in which this Court struck down an ordinance prohibiting the distribution of anonymous hand bills, applies in this case. This analysis ignores the *Buckley* court's distinction of *Talley* from the disclosure requirements in elections in *Buckley.* In particular, this Court stated the following with regard to the disclosure reporting requirements of Section 434(e) of the Federal Election Campaign Act:

> Section 434(e), as we have construed it, does not contain the infirmities of the provisions before the Court

> in *Talley v. California,* 362 U.S. 60, 4 L.Ed.2d 559, 80 S.Ct. 536 (1960) and *Thomas v. Collins,* 323 U.S. 516, 89 L.Ed. 430, 65 S.Ct. 3 (1945). The ordinance found wanting in *Talley* forbade all distribution of handbills that did not contain the name of the printer, author or manufacturer and the name of the distributor. The city urged that the ordinance was aimed at identifying those responsible for fraud, false advertising and libel, but the Court found that it was "in no manner so limited." [citation omitted]. Here, as we have seen the disclosure requirement is narrowly limited to those situations where the information sought has a substantial connection with the governmental interest sought to be advanced. *Thomas* held unconstitutional a prior restraint in the form of a registration requirement for labor organizers. The Court found the state's interest insufficient to justify the restrictive effect of the statute. The burden imposed by Section 434(e) is no prior restraint, but a reasonable minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view.

*Buckley,* 424 U.S. at 81-82.

Likewise, in the case of *Wilson v. Stocker,* 819 F.2d 943 (10th Cir. 1987), cited by the appellants in their Jurisdictional Statement, the Tenth Circuit Court of Appeals in striking down a state statute prohibiting anonymous distribution of campaign literature distinguished the *Buckley* decision stating that "*Buckley* is concerned with federal laws regulating the disclosure of those who make political contributions and expenditures, the rationale applied there is of little help in evaluating a law such as Section 15-111, which applies to merely those who distribute campaign literature." *Id.* at 949.

Further, in the case of *People v. White,* 506 N.E.2d 1284 (Ill. 1987), cited by the appellants in their Jurisdictional Statement, the Illinois Supreme Court distinguishes a statute prohibiting the distribution of political literature which does not have printed the name and address of the persons publishing and distributing the literature from campaign financial disclosure laws in two respects. First, contributing to a political campaign, unlike distributing political literature, is not an act of pure speech. Second, the plaintiffs in *Buckley* conceded and the Court agreed that the disclosure requirements appear to be the least restrictive alternatives for achieving the state's compelling interests. *Id.* at 1290.

The only argument asserted by appellants in response to the State's compelling interest of "informing the voters of how a referendum election is financed" is briefly stated as follows:

> The asserted interest in an informed electorate has been addressed several times. The state's fear that voters might make an ill-advised choice does not provide the state with a compelling justification for limiting speech. *Brown v. Hartledge,* 456 U.S. 455, 460 (1982); *accord Commonwealth v. Dennis,* 329 N.E.2d 706, 709 (Mass. 1975) (striking down a law prohibiting anonymous campaign literature.)

Appellants' Jurisdictional Statement, p. 16.

Neither the *Brown* nor *Dennis* cases have anything to do with whether informing voters in referenda elections how campaigns are financed is a compelling state interest. In the *Brown* decision, this Court was concerned with a statute prohibiting candidates from offering benefits to voters in exchange for votes; whereas, in the *Dennis* deci-

sion the Massachusetts Supreme Court was concerned with a law prohibiting distribution of anonymous campaign literature. As has already been stated, this Court in *Buckley* distinguished *Talley* and its progeny. Furthermore, *Bellotti* and *CARC* laid to rest any arguments that simple disclosure requirements in all elections including referenda elections are prohibited by the free speech clause.

The appellants also allege a violation of their associational rights because groups whose activities fall within the purview of the Campaign Financial Disclosure Law must file disclosure statements while individuals are not required to do so. This Court in *Buckley* has already determined that important governmental interests justify an interference with association created by disclosure. These interests apply equally to ballot questions. *Citizens Against Rent Control, supra; Advisory Opinion on Constitutionality of 1975,* P. A. 227, 396 Mich. 465, 242 N.W.2d 3 (1976).

Each candidate or political campaign committee must file a disclosure statement of all contributions received and expenditures made. Tenn. Code Ann. § 2-10-105. If an individual provides a total amount of more than $100.00 during the period covered by the statement, the statement must list the name of individual, the complete address, and the amount contributed. Tenn. Code Ann. § 2-10-107. Thus, the individual's financial participation and the extent of the participation is revealed. If groups were not required to file statements indicating the individuals who gave over $100.00, then many contributions would go unrevealed.

> Funds provided to a candidate or political party or campaign committee either directly or indirectly through an intermediary constitute a contribution.

> In addition, dollars given to another person or organization that are earmarked for political purposes are contributions under the act.

*Buckley v. Valeo,* 424 U.S. at 24. The disclosure required by Tennessee's Campaign Financial Disclosure Law prevents the hiding of contributions by funneling them through an intermediary. In this case, the intermediaries are the appellants.

Contrary to the arguments of the appellants in their Jurisdictional Statement, it is obvious that the question of the constitutionality of disclosure and registration requirements of Tennessee's Campaign Financial Disclosure Laws as applied to the appellants is a settled and unsubstantial question which needs no review by this Court. This conclusion is based upon the fact that this Court has implicitly upheld the constitutionality of such simple disclosure requirements as applied to referenda elections through *Buckley, Bellotti,* and *CARC.*

## II.

## THE APPELLANTS HAVE FAILED TO PRESENT ANY SUBSTANTIAL QUESTION REGARDING THE CONSTITUTIONALITY OF TENNESSEE'S CAMPAIGN FINANCIAL DISCLOSURE LAW WITHIN THE CONTEXT OF THE FREE EXERCISE AND ESTABLISHMENT CLAUSES OF THE FIRST AMENDMENT

First, it should be noted that the appellants' free exercise argument has little weight in light of this Court's decision in *Heffron v. International Society for Krishna Consciousness,* 452 U.S. 640 (1981). The facts in the *Heffron* decision concern a Minnesota state fair regula-

tion which required all groups which desired to sell or exhibit materials to do so from fixed locations. The plaintiffs, a religious group, sought to have this rule declared unconstitutional as applied to them.

The *Heffron* Court agreed that such a restriction was an infringement upon the free speech rights of everyone who wished to sell and distribute written materials or to solicit funds. However, the Court found a compelling state interest furthered by the rule being "the need to maintain the orderly movement of the crowd given the large number of exhibitors and persons attending the fair." *Id.* 452 U.S. at 649-50. In response to the plaintiff's argument that a judicial exception for the plaintiffs on the grounds of their free exercise rights was a less restrictive alternative which would further this compelling state interest, the Court stated the following:

> The justification for the rule should not be measured by the disorder that would result from granting an exemption solely to the plaintiffs. That organization has no central claim to first amendment objections as compared to other religions who also distribute literature and solicit funds. None of our cases suggest that the inclusions of the paripetitic solicitation as part of church ritual entitles church members to solicitation rights in public forums superior to those members of other religious groups that raise money but do not ritualize the process. Nor for the present purposes do religious organizations enjoy rights to communicate, distribute and solicit on the fair grounds superior of those of other organizations having social, political or other idealogical messages to prosylitize. These non-religious groups seeking support for their activities are entitled to rights equal to those of religious groups to enter a political forum and spread their views either by soliciting funds or by distributing literature.

*Id.* 452 U.S. at 652-53. The appellants are asking this Court to afford them a privilege not granted to any other group in the election process. Fundamental fairness and equality in the application of the disclosure law is clearly a compelling reason to justify its application to churches which participate in the election process for whatever reason.

Appellants have indicated that *United States v. National Committee for Impeachment,* 469 F.2d 1135 (2nd Cir. 1972), and *American Civil Liberties Union v. Jennings,* 366 F.Supp. 1041 (D.D.C. 1973), vacated as moot sub nom *Staats v. ACLU,* 422 U.S. 1030 (1975), support their contention that disclosure acts cannot be applied to "non-political" organizations. Yet, both cases dealt with advertisements that did not advocate a particular election result. Therefore, the courts found that they did not fall within the scope of the Federal Election Campaign Act.[3] These two cases concern the phrase "for the purpose of influencing" an election. In *Buckley v. Valeo,* 424 U.S. at 80, this Court construed such language as reaching only expenditures that expressly advocate a particular election result. Similarly, the Tennessee Campaign Financial Disclosure Act "is triggered only when a group is financing election outcome specific advocacy in a particular campaign." *Bemis Pentacostal Church v. State of Tennessee,* 731 S.W.2d at 905. A finding of express advocacy depends upon the use of words such as "vote for," "elect," "vote against," and "defeat." *Buckley v. Valeo,* 424

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[3]It should also be noted that both of these cases involve free speech and have absolutely nothing to do with the religion clauses.

U.S. at 44, n. 52. *See also Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, — U.S. —, 107 S.Ct. 616, 623 (1986). As the Tennessee Supreme Court found, the plaintiffs clearly engaged in financing election outcome specific advocacy. *Bemis Penticostal Church v. State of Tennessee,* 731 S.W.2d at 906. The ad placed by the West Jackson Baptist Church in *The Jackson Sun,* which ran July 15, 1984 contains the words "defeating this effort to bring liquor by the drink to our city", and "vote *against* liquor by the drink."

This Court has already found that requiring disclosure from organizations whose primary purpose was not the support of a ballot issue did not present a substantial federal question. In *Iowans for Tax Relief v. The Campaign Finance Disclosure Commission,* 331 N.W.2d 862 (Iowa 1983) appeal dismissed 464 U.S. 879 (1983), the Supreme Court of Iowa held that Iowa's disclosure act covered an organization which accepted contributions for the purpose of supporting a ballot measure, even though such activity was not the organization's primary purpose. The Court also found that the required disclosure was related to an overriding governmental interest and, consequently, that the act did not violate the freedom of speech or freedom of association guaranteed by the First Amendment. This Court dismissed the appeal "for want of a substantial federal question." *Id.*, 464 U.S. 879.

In *New York Civil Liberties Union, Inc. v. Acito,* 459 F.Supp. 75 (S.D. N.Y. 1978), the New York District Court indicated that the government's interest in disclosure of contributors to and expenditures of an "essentially apolitical organization" is minimal. *Id.* at 89. Yet, this Court

has found that "religious groups inevitably represent certain points of view and not infrequently assert them in the political arena . . . " *Walz v. Tax Commission,* 397 U.S. 669, 695 (1970) (Harlan, J., concurring), quoted in *Larson v. Valente,* 456 U.S. 228, 252 (1982). The testimony at the hearing in this case provides ample evidence of these appellants' participation in the election process. Furthermore, these appellants are not "unpopular" organizations such as the one involved in *Acito.* No evidence was introduced at trial that persons identified by appellants as having given one hundred dollars or more specifically toward the defeat of the liquor referendum would be subject to harassment or reprisals.

The exclusion of nonpartisan groups from the disclosure requirements would emasculate the Campaign Financial Disclosure Act. Large political contributions could then be made by utilizing these groups as intermediaries. *Buckley v. Valeo,* 424 U.S. at 24, n. 52. Such contributions would be undisclosed. Additionally, such an exemption would permit these groups to spend money with impunity in an effort to influence a referendum election without such efforts being exposed to the light of public knowledge.[4] In any given election, a nonpartisan group

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[4]It would appear that at least 30 states other than Tennessee require disclosure in the referenda context. *See:* Alaska Stat. § 15.13.070 (Supp. 1986); Cal. Elec. Code § 11553 (West 1977); Colo. Rev. Stat. § 1-45-104 (1980 & Supp. 1986); Conn. Gen. Stat. Ann. § 9-333 (West Supp. 1987); Fla. Stat. Ann. § 106.07 (West Supp. 1987); Ga. Code Ann. § 40-3814 (Sup. 1987); Hawaii Rev. Stat. § 11-195,213 (1983); Idaho Code § 67-6607 (Supp. 1987); Ind. Code Ann. § 3-9-5-2 (West Supp. 1987); Iowa Code

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can have a significant effect. For example, with the influence of these churches a liquor referendum was defeated in August 1984, but without their influence one was approved in November 1984.

The registration provision of the Act, Tenn. Code Ann. § 2-10-105(e) requires that each candidate and each political campaign committee certify the name and address of its political treasurer before it can receive or make an expenditure. Appellants object to the label "political campaign committee." Recently, this Court dealt with the use of the term "political propaganda" in the Foreign Agents Registration Act. *Meese v. Keene*, — U.S. —, 107 S.Ct. 1862 (1987). The appellee in that case alleged that showing films labeled "political propaganda" would injure his reputation and his ability to practice his profession. The district court held that Congress' use of the term was "a wholly gratuitous step designed to express the suspicion with which Congress regarded the materials." 619 F.Supp. 1111, 1125. This Court found that:

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Ann. § 56.4 (West Supp. 1987); Kan. Stat. Ann. 25-901 (1986); Ky. Rev. Stat. § 121.180 (Supp. 1986); Mass. Gen. Laws Ann. Ch. 55, § 18 (West Supp. 1987); Mich. Comp. Laws Ann. § 169.225 (West Supp. 1987); Mo. Ann. Stat. § 130.041 (1987); Mont. Code Ann. § 13-37-225 (1987); Neb. Rev. Stat. § 49-1455, 1461 (1984); N. J. Stat. Ann. § 19:44A-8 (West Supp. 1987); N.M. Stat. Ann. § 1-19-27 (1985); N. Y. Election Law § 14-102 (McKinney 1978 & Supp. 1987); Ohio Rev. Code Ann. § 3517.11 (Page Supp. 1986); Okla. Stat. Ann. tit. 74, § 4211 (West 1987); Or. Rev. Stat. § 260.-073 (Supp. 1987); 25 Pa. Cons. Stat. Ann. § 3246 (Purdon Supp. 1987); R. I. Gen. Laws § 17-25-7 (Supp. 1983); S. D. Codified Laws Ann. § 12-25-19.1; (1982); Vt. Stat. Ann. tit. 17, § 2831 (1982 & Supp. 1986); Wash. Rev. Code Ann. § 42.17.080 (Supp. 1987); W. Va. Code § 3-8-5 (1987); Wisc. Stat. Ann. § 11.06 (West Supp. 1986).

> It is axiomatic that the statutory definition of the term excludes unstated meanings of that term. [citation omitted] Congress' use of the term "propaganda" in this statute, as indeed in other legislation, has no pejorative connotation. As judges it is our duty to construe legislation as it is written, not as it might be read by a layman, or as it might be understood by someone who has not even read it. [footnote omitted]

*Meese v. Kenne,* — U.S. at —, 107 S.Ct. at 1873. Additionally, the Court noted that the term "lobbying" has a negative connotation, yet stated "we are not aware of any suggestion that these negative connotations violate the First Amendment." *Id.,* — U.S. at —, n. 19, 107 S.Ct. at 1873, n. 19 (citing *United States v. Harriss,* 347 U.S. 612 (1954). Restraints of action based on such fears are self-censorship. *United States v. Harriss,* 374 U.S. 612, 626 (1954); *Commission on Independent Colleges and Universities v. New York Temporary State Commission on Regulation of Lobbying,* 534 F.Supp. 489 (N.D. N.Y. 1982).

The appellants continue to advocate the view that the exception to the definition of "contribution" found in Tenn. Code Ann. § 2-10-102(3)(B) somehow gives the news media a special advantage not given to religious groups. Appellants' Jurisdictional Statement at 23, 25. Yet the Tennessee Supreme Court, the final authority on the meaning of Tennessee's statutes, found:

> Plaintiffs' regular and continuing programs of broadcasting their religious services on radio or television or of publishing and distributing church newsletters are not and cannot be considered campaign contributions or expenditures, regardless of whether they advocate a particular election result or not in the course of such activities, as these activities are protected by

> the First Amendment and are expressly excluded from the operation of the Act under T.C.A. § 2-10-102 (3)(B).

*Bemis Pentacostal Church v. State of Tennessee,* 731 S.W. 2d 905. Churches and the media are treated the same under the Campaign Financial Disclosure Act. The exception found in Tenn. Code Ann. § 2-10-102(3)(B) is an exception from the definition of "contribution" only. It does not exempt religious organizations or the media from the scope of the Act. Consequently, both religious organizations and the media must comply with the Act when they engage in actions not exempted by Tenn. Code Ann. § 2-10-102(3)(B). For example, if a corporation which published a newspaper had given money to Citizens Against Drugs and Alcohol to help defeat the liquor-by-the-drink referendum, that corporation would be required to file a disclosure statement just like the Appellants.

In one small paragraph, appellants allege that the "unnecessary regulation" of these churches inhibits religion and fosters excessive entanglement between church and state. Appellant's Jurisdictional Statement at 26. They do not elaborate on how this occurs.

The necessity of covering all groups attempting to influence an election by engaging in outcome specific advocacy is well demonstrated in the record, the opinion of the Tennessee Supreme Court and elsewhere in this pleading and will not be repeated here. The opinions of this Court lead to the inescapable conclusion that no establishment clause violation is present in this case.

This Court has often noted that total separation of church and state is not possible. "No significant segment

of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all other parts, much less from government." *Lynch v. Donnelly,* 465 U.S. 668, 673 (1984). The establishment clause requires government neutrality among competing religions. *Walz v. Tax Commission,* 397 U.S. 664 (1970). It also requires government neutrality between religion and non-religion. *Grand Rapids School District v. Ball,* 473 U.S. 373 (1985).

Under this Court's opinions, a statute must pass a three part test to avoid the prohibition of the establishment clause:

(1) The statute must have a secular purpose;

(2) The principal or primary effect of the statute must be one that neither advances nor inhibits religion;

(3) The statute must not foster an excessive governmental entanglement with religion.

*Lemon v. Kurtzman,* 403 U.S. 602 (1971); *Grand Rapids School District v. Ball, supra.*

Tennessee's Campaign Financial Disclosure Act does not run afoul of this three part test. First, informing the voting public of how elections are financed is a clearly secular purpose. An informed public is better able to make choices between candidates and between causes. Second, the primary effect of the Act is to inform the voting public of campaign financing. The fact that the statute applies to a broad range of groups is an important indication of a secular effect. *Widmar v. Vincent,* 454 U.S. 263 (1981). Clearly, the Act does not advance or inhibit

religion. All religious and non-religious political campaign committees are treated alike. No benefits are provided. Any requirements placed on religious organizations by the Act are no different from those placed on other groups who fall within the purview of the Act. The Act cannot be viewed as either an endorsement or a disapproval of religion.

Third, the Campaign Financial Disclosure Act does not foster excessive entanglement with religion. Entanglement is a question of kind and degree. *Lynch v. Donnelly*, 435 U.S. at 684. The prohibition is against *excessive* entanglement. Generally, excessive entanglement exists where there is "comprehensive, discriminating and continuing state surveillance . . .," *Lemon v. Kurtzman*, 403 U.S. at 619, or "state inspection and evaluation of the religious content of a religious organization . . .," *Id.*, 403 U.S. at 620. The class affected by the Act is not defined in any way by religious criteria. Nor is the information sought religious in nature.

Appellants' arguments in the courts below have focused upon the assertion that the administrative burden of registering and filing under the Act and the possible investigation by the Attorney General constitute excessive entanglement. Yet, no continuing surveillance is required and the information sought does not reveal the inner workings or financial status of the organization required to file the disclosure. There is no danger of governmental direction of churches. The adminstrative burden, which is directly related to the State's compelling interests, is relatively insignificant and can "be readily performed within the churches' present organizations." *Bemis Pentacostal Church v. State of Tennessee*, 731 S.W.2d at 903.

The investigation by the Attorney General required by Tenn. Code Ann. § 2-10-109 would not constitute excessive entanglement either. In *Ohio Civil Rights Commission v. Dayton Christian Schools,* — U.S. —, 106 S.Ct. 278, 2734 (1986), this Court found that the "Commission violates no constitutional rights by merely investigating the circumstances of Hoskinson's discharge in this case, if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge." In an investigation under Tenn. Code Ann. § 2-10-109, it is clear that the Attorney General merely looks to see if the organization made contributions and/or expenditures to influence an election and if any individuals gave the organization a contribution of more than one hundred dollars toward an expenditure. This investigation would be far less onerous than the one approved by this Court in *Dayton Christian Schools.* There would be no evaluation of doctrinal matters. No evaluation would be made as to the organization's religious beliefs. There would be no determination of questions of intent, motive or pretext.

## III.

## THERE IS NO SUBSTANTIAL ISSUE AS TO WHETHER THE STATE PROVIDED SUFFICIENT REASONS TO JUSTIFY THE APPLICATION OF TENNESSEE'S CAMPAIGN FINANCIAL DISCLOSURE LAW TO THE APPELLANTS

The appellants argue that this Court should hear this appeal on the grounds that the State provided no compelling reasons sufficient to justify application of Tennessee's Campaign Financial Disclosure Law to them. This

argument ignores the justifications set forth by the Tennessee Supreme Court in its opinion in this case as follows:

> The recent history of campaign financial abuses as well as growth and possible dominance of special political action committees make the state's disclosure requirements necessary to allow the public to have some gauge by which to assess the sources, content and frequency of campaign publicity and activity. The informational purpose of disclosure is no less compelling in referenda. Referenda are the most direct expression of popular will and should be conducted in an open forum for debate of public policy. Unlike candidate elections, which occur periodically to provide the electorate the opportunity to oust unpopular or corrupt public officials, referenda often commit the state or its political subdivisions to what may be, as a practical matter, essentially irreversible and costly courses of action. Vigorous, free, well-informed, and public debate can only be enhanced by disclosure of campaign financing in both referenda and candidate elections. No faction with access to substantial financial resources should be able to distort the process by flooding the forum with media campaigns without at least disclosing this fact to the voters. Any group that wishes to participate in the process through financing of election outcomes specific advocacy should reveal the extent of this financial involvement to the public. This is all that the people of the state of Tennessee have asked of groups directly participating in election campaigns through the mechanism of the Campaign Financial Disclosure Act.

*Bemis Pentacostal Church v. State of Tennessee,* 731 S.W. 2d at 904.

Simply stated, there is no necessity in putting on proof that informing the voters of how an election is financed is a

compelling interest when this Court in the *Buckley* case has already indicated that such an interest will be sufficient to justify such an intrusion on the First Amendment right of such groups. In the case of *Minnesota State Ethical Practices Board v. National Rifle Assn. of America,* 761 F.2d 509 (8th Cir. 1985), the Eighth Circuit Court of Appeals applied the compelling interest this Court set forth in *Buckley* under the Federal Election Campaign Act of 1971 to Minnesota's Ethics in Government Act, stating:

> The state of Minnesota's interest in disclosure outweighs any infringement of the appellant's First Amendment rights. The infringement in this case is no greater than that in *Buckley,* because the disclosure requirements here parallel those in the campaign act.

*Id.* at 512. Likewise, Tennessee's Campaign Financial Disclosure Law parallels that of *Buckley* in terms of the disclosure requirements. As the Tennessee Supreme Court indicated, the fact that this is a referendum election does not make the State's interest in providing any information to the voters as to how the election is financed any less compelling.

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## CONCLUSION

The thrust of the appellants' argument is that this Court has never directly addressed the question of whether the State can constitutionally require disclosure of financial participation in referenda elections. As a basis for granting jurisdiction in this case, the appellants argue that the *Talley* decision which struck down a law prohibiting anonymous distribution of campaign literature applies in this case. This Court in *Buckley* has already indicated that the *Talley* analysis does not apply to campaign disclosure laws; moreover, in both *Bellotti* and *CARC* this Court has implicitedly approved requiring disclosure of campaign financing in referenda elections. Accordingly, this Court should either dismiss or affirm this appeal.

Respectfully submitted,

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